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SUPREME COURT
OF THE
UNITED STATES

Case No. 449

October Term, 1933

E. W. CLARK,
as Receiver,

Petitioner,

versus

HARRY O. WILLIARD, W. W. WHEATON,
and C. H. RAY, as Trustees of Gordon
Campbell-Kevin Syndicate, a Common-Law Trust,
and GORDON CAMPBELL-KEVIN SYNDICATE,
a Common Law Trust,

Respondents.

Supplemental Brief of Respondents

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THE REPUBLICAN, LEWISTOWN, MONT.

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NATURE OF THE CAUSE.

As we view the question before this Court, there is involved an essentially different legal situation than is stated by petitioner in his supplemental brief.

Heretofore respondents filed their brief in opposition to the granting of the writ of certiorari herein, based, as they viewed the matter, upon the questions of jurisdiction of this court. The questions of jurisdiction were so intimately interwoven

with questions which would arise on the merits, that undoubtedly the Court felt constrained to hear the case upon its merits which would not necessarily preclude a re-examination of the jurisdictional questions.

FURTHER STATEMENT OF THE CASE.

To correctly understand the precise situation of the parties it is important at this juncture to direct specifically to the attention of the Court, that the action in which Respondents judgment was recovered, was an action entirely distinct from the proceeding of Mieyr versus Federal Surety Company (P. 49 to 63 inclusive), all as appears set forth in the judgment roll in the latter proceeding.

The record before this Court (R. 59) shows that the amended Complaint (R. 49 to 59 inclusive), was filed January 31, 1928.

The Answer itself was filed February 29, 1928 (R. 60). The obvious fact is that the action was instituted sometime prior to January 31, 1928. The defendant,—then admittedly sui juris,—by its general appearance and answer (R. 59) vested the District Court of the Tenth Judicial District for Fergus County, with jurisdiction. If that court ever lost jurisdiction of the case, it lost it because of the subsequent dissolution of the defendant, Federal Surety Company, therein. That it did not lose jurisdiction is clear from a consideration of the following propositions of law:

I.

THE REMEDIAL LAW OF MONTANA CONTROLLED THE PROCEEDINGS IN THE DISTRICT COURT OF THE TENTH DISTRICT FROM THE TIME JURISDICTION WAS OBTAINED UNTIL JUDGMENT WAS ENTERED.

This Court has held that questions of procedure and prac-

tice are questions to be determined by the Court of the forum.

There is no clause in the Constitution which restrains the right in each state to legislate upon the remedy in suits on judgments of other states exclusive of all interference with their merits. Bacon v. Howard, 20 How. 25, 15 L. Ed. 811.

We shall very seriously controvert the contentions of petitioner that the corporation occupied the status of a deceased person in Montana.

But for the purpose of this argument, let it be assumed that the corporation was dead in Iowa.

II.

THERE WAS NO PLEA IN ABATEMENT NOR ANY SUGGESTION OF A REASON FOR ABATEMENT OF THE ACTION WHICH RESULTED IN RESPONDENTS OBTAINING THEIR JUDGMENT AGAINST FEDERAL SURETY COMPANY.

The suggestion of that alleged fact was never made to the District Court of the Tenth Judicial District for Fergus County, Montana. No attempt was made by the Federal Surety Company or its Counsel in that action to direct attention of the District Court to even the fact that Federal Surety Company was involved in a proceeding for the appointment of a Receiver and dissolution (R. 49).

On the day when the judgment was entered (R. 60), Messrs. Ayers & Ayers appearing as Counsel for Federal Surety Company, did not apprise the Court of the alleged dissolution, or alleged want of capacity of Federal Surety Company, but simply informed the Court that they were not ready for trial; a matter addressed to the discretion of the court under proper rules of law. Under those circumstances the judgment entered was a valid judgment.

It is settled by the great weight of authority that:

"The general rule is that, where jurisdiction of the parties to an action, has duly attached, the fact that one of them died before the rendition of the judgment, that fact not appearing of record, does not make the judgment absolutely void, so as to permit its impeachment in a collateral proceeding."

34 C. J. 555;
See also 34 C. J. 292, Sec. 507.

In 33 C. J. 1107, it is said:

"But the great preponderance of authority is to the effect that where the Court has acquired jurisdiction of the subject matter, and the person during the lifetime of the party, a judgment rendered for or against him, after his death, although erroneous and liable to be set aside, is not void or open to collateral attack."

See also:

15 R. C. L. 618, Sec. 58.

In 1 C. J. 137, it is said:

"The question of continuing or reviving actions by or against a corporation, after its dissolution, depends upon the laws of the state in which the action is pending, and a foreign statute relating thereto is of no avail."

In 1 C. J. 137, 138, it is said:

"As a rule, defects and objections as to the action or proceeding or as to parties which do not bar the same, but good merely in abatement, as shown in the preceding sections, to be available, must be pleaded or otherwise properly presented to the Court, or they will be waived."

The general rule, which is supported by cases from practically all jurisdictions, is well stated in 34 C. J. 520, Sec. 827:

"A direct attack on a judgment is an attempt to avoid or correct it, in some manner provided by law, in a proceeding instituted for that very purpose, in the same action and in the same court, and the fact that other incidental relief is also asked is immaterial. Such is a motion or other proceeding to vacate, annul, cancel or set aside the judgment. A direct action to impeach and avoid the judgment, a motion in arrest of judgment, for a rehearing or for a new trial, or any proceeding to review it in an appellate court, whether by appeal, error, or certiorari,

action to review, bill of review or writ of review. * * * Where the element of fraud or mistake is involved in the issue, it is the general rule that the attack is direct. A collateral attack is an attempt to impeach the judgment by matters dehors the record, in an action other than in which it is rendered; an attempt to avoid, defeat or evade it, or deny its force and effect in some incidental proceeding not provided by law for the express purpose of attacking it; any proceeding which is not instituted for the express purpose of annulling, correcting or modifying such decree."

III.

WHEN RESPONDENTS PETITIONED THE DISTRICT COURT OF THE EIGHTH DISTRICT FOR LEAVE TO LEVY IT WAS ONLY IN AID OF EXECUTION. THE PROCEEDING IN BEHALF OF THE MOTION SHOWS THIS WAS DONE AS A PRECAUTIONARY MEASURE, AND WITH THE SUGGESTION OF THE BELIEF THAT THE EIGHTH DISTRICT COURT HAD NO JURISDICTION IN THE ACTION TO APPOINT A RECEIVER (R. 13).

In 34 C. J. 522, Sec. 828, it is said:

"A proceeding to enforce a judgment is collateral to the judgment, and therefore no inquiry into its regularity or validity can be permitted in such a proceeding, whether it is a direct action on the judgment, * * * or proceeding supplementary to execution, or bill in equity in aid of execution, or to enforce the lien of the judgment. * * *"

Again, it is said, in 34 C. J. 523, Sec. 829:

"According to some decisions, a suit in equity to enjoin or set aside a judgment constitutes a direct attack upon it; according to others, such a proceeding is collateral, unless fraud is alleged; while still others hold to neither the one or the other, but is properly designated an indirect attack. * * * If an injunction only is sought, the suit is a collateral attack, but if Plaintiff seeks also to have the judgment set aside, and the case retried on the merits, it is a direct attack * * *. An application for a writ of prohibition to forbid the Court to enforce its judgment is a collateral attack. * * * A motion to quash an execution is a collateral attack upon the judgment on which it is

based, unless the ground of attack is that the judgmen was obtained by fraud. * * * The validity or correctness o a judgment cannot be impeached in a subsequent actio brought by the former Defendant against the forme Plaintiff, involving the same issues, or in an action to re cover back the money paid, under the judgment, or fo fraud and conspiracy in obtaining the judgment."

Also, in 34 C. J. 525, it is said:

"The rule forbidding the collateral impeachment o judgments applies to all persons who were parties to th action in which the judgment was rendered, and to a those who are in privity with them."

On the subject of what constitutes privity, 34 C. J. 101 Sec. 1432, is supported by all authority:

"Privity means a mutual or successive relationship t the same rights of property, and within the rules relatin to the conclusiveness of judgments, all persons are privie to a judgment whose succession to the rights were de rived through or under one or the other of the parties t the action, and accrued subsequent to the commencemen of that suit."

If petitioner Clark is not in privity with Federal Surety Company it would be difficult to define his status.

O'Sullivan v. Douglas, 124 Ky. 243; 98 S. W. 99

At the time the judgment (R. 61-62) was rendered in favo of respondents, there was pending in another District Court i Montana, to-wit, in the District Court of the Eighth Judicia District in and for the County of Cascade, the action of Miey versus Federal Surety Company of Davenport, and E. W Clark, as Receiver of Federal Surety Company of Davenport Iowa, for the appointment of a receiver. That action so entitled was instituted on or about the 25th day of March, 1932 (R. 8 9). IT DID NOT INCLUDE THESE RESPONDENTS AS PARTIES. Since the writ of certiorari has issued herein, and the record has been brought into this court, it will be seen tha the action brought by Mieyr in the Eighth District and which the Supreme Court of Montana held was a nullity (Mieyr v

Federal Surety Co., 23 Pac. (2d) 959), did not involve these respondents. These respondents, after securing their judgment, in no wise subject to collateral attack, as we have seen, petitioned the District Court of the Eighth District for leave to levy (R. 11-12).

The minutes of the Eighth District Court (R. 13) declare:

> "No evidence was submitted other than as contained in the petition for Leave to Levy filed by Petitioners, but it was stated to the Court that the judgment obtained by the Petitioners against Federal Surety Company on the 20th day of May, 1932, was made without knowledge of the receivership proceedings in Iowa; that so far as the local Receiver was concerned, D. A. Crichton, they felt that no jurisdiction had been obtained whereby he could make any claim to the money sought to be levied upon and moreover that he had not, as yet, done so; that the action in making levy was valid and unimpeachable but that in order to save any argument, concerning the matter, it was desired to have the leave of Court requested."

It can plainly be seen that respondents entered that court as a matter of respect and to avoid the possibility of a claim of contempt. They did not become parties to the action. Their position as set forth in the minutes, was fully justified by the later decision of the Montana court. That portion of the Montana Court's opinion declaring that Mieyr's complaint did not give the Court jurisdiction, is not attacked by petitioner here, nor, we submit, is it subject to attack. AT THAT TIME, THE TIME RESPONDENT'S JUDGMENT WAS ENTERED, PETITIONER, CLARK, AS ONE OF THE DEFENDANTS IN THE ACTION INSTITUTED BY MIEYR, WAS OPPOSING MIEYR'S APPLICATION FOR THE APPOINTMENT OF A RECEIVER (R. 10).

Concurrently with the granting of Leave to Levy, the Court overruled Clark's resistance (R. 11). Thereupon Clark evi-

dently determined to assert his claims by answer. (R. 15-21).

On July 25th, 1932, notice was served upon respondents that Mieyr would move the Court on August 3rd for an annulment of the Order Granting Leave to Levy (R. 14-15), and the Eighth District Court then entered its decree in accordance with the prayer of Clark's answer (R. 34-39).

Thereupon these respondents because the court in its decree revoked the order granting leave to levy (R. Par. 12, pp. 38-39), again entered the case with a motion to vacate the order and decree, asserting inter alia (R. 40):

> "2. That the Court was without jurisdiction to appoint a receiver in said action."

And in support of said motion, filed an affidavit (R. 44-48), and set up the judgment obtained in the Tenth District, by copy of the judgment roll (R. 49-62). On appeal by respondents to the Supreme Court of Montana, their contention that the proceeding in the District Court of the Eighth District WAS WITHOUT JURISDICTIONAL FOUNDATION, WAS UPHELD. How, under these circumstances, any foundation was laid for the claim that a question arose which could invoke the jurisdiction of this court, is beyond comprehension. The judgment of respondents was not directly attacked, nor was its validity or effect even indirectly challenged (R. 14-15).

The record speaks that Counsel for respondents in the Eighth District Court, at the time the Motion to Set Aside the Order Granting Leave to Levy, was heard, asked to be enlightened as to the ground of the motion and were told by opposing counsel that the order of May 24th above set forth granting the right * * * to levy executions, was void (R. 15).

It is true that petitioner asserted in his answer, as against his adversary Mieyr, the rights claimed under the constitution

of the United States; but, in a proceeding where no jurisdiction was reposed, as was ultimately determined by the Supreme Court of Montana. That the full faith and credit clause of the Constitution can be asserted only in accordance with local rules of procedure, is settled beyond controversy.

34 C. J. 1107, reading:

> "An action founded on a judgment of a sister state must be governed by the rules of pleading and practice prevailing where such action is brought, subject to the qualification that the procedure obtaining in the latter state cannot impair the efficacy of a judgment of a sister state, or deny an adequate remedy for the enforcement."

The Supreme Court of Montana did not deny full faith and credit to the Iowa decrees and statutes, nor were those rights ever, except abortively, asserted. Their assertion in a proceeding that failed to give the Court jurisdiction, was merely academic.

It must be borne in mind that the respondents were trustees of a Montana Common Law Trust (R. 49). They made no appearance in the Iowa Court, nor was the judgment therein binding upon them or the Trust.

32 C. J. 917.

Security Sav. Etc. Co. v. Rogers, 6 Idaho 526; 57 Pac. 316.

Smith v. Winchester, 96 Me. 480; 52 Atl. 1017; 90 Am. St. Rep. 414.

Met. Rub. Co. v. Place, 147 Fed. 90.

When they applied (R. 11-12) as a matter of caution (R. 13) to the District Court of the Eighth District for leave to levy, they did not enter a proceeding by Clark to enforce his judgment. At that time, he, like respondents, was contending that the Eighth District Court in Montana had no jurisdiction (R. 10). That motion had been submitted and was denied concurrently with the granting of leave to levy (R. 10).

The Supreme Court held that there was no jurisdiction to appopint a receiver given by Mieyr's complaint.

Respondents occupy the position of simply protecting their rights, all in an orderly and proper manner, out of respect for the courts. The analogies of the cases digsted in note 33 (b), 32 C. J. 916, can be easily applied here.

IV.

ARGUMENT ON THE MERITS.

Up to this point in our argument we have presented important and we think controlling, matters for the consideration of this Court. We think the record in the case precludes the examination of the question of graver import presented in the brief of petitioner. Nevertheless, to meet the contentions of petitioner, as we believe they can be met on the merits, we shall present those principles and authorities which we believe correctly resolve the question to be derived from the assumed facts of the situation set forth in petitioner's brief.

V.

THE RULE THAT LEGISLATURES MAY IMPOSE ANY RESTRICTIONS THEY MAY SEE FIT ON ADMITTING CORPORATIONS TO DO BUSINESS WITHIN THE STATE, FINDS ITS MOST LIBERAL EXTENSION IN CASES OF FOREIGN INSURANCE COMPANIES.

An insurance corporation is not engaged in interstate commerce.

Paul v. Virginia, 8 Wall. 168; 19 L. Ed. 357.
Ducat v. Chicago, 10 Wall. 410; 19 L. Ed. 972;
Liverpool & L. Life & F. Ins. Co. v. Mass. (Liverpool & L. Life & F. Ins. Co. v. Oliver), 10 Wall. 566; 19 L. Ed. 1029.
Home Ins. Co. v. Augusta, 93 U. S. 116; 23 L. Ed. 825.
People v. Thurber, 13 Ill. 544.

Farmers & M. Ins. Co. v. Harrah, 47 Ind. 236.
List v. Com., 118 Pa. 322; I Inters. Com. Rep. 784; 12 Atl. 277.
State v. Phipps, 50 Kan. 609; 18 L. R. A. 657; 34 Am. St. Rep. 152; 4 Inters. Com. Rep. 299; 31 Pac. 1097.

And in State ex rel Richards v. Ackerman, 24 L. R. A. 298, after citing these authorities the Court said:

> "Therefore, to insurance companies the general doctrine fully applies, that a state may exclude a foreign corporation, or impose upon it, as a condition of doing business, any burdens or restrictions that it chooses, reasonable or unreasonable."

See also Herbring v. Lee, 126 Or. 588; 269 Pac. 236; 60 A. L. R. 1165-70.

A State as a general rule may admit a corporation upon any condition it may see fit to impose.

In 6 Enc. U. S. Sup. Ct. Dec. 308, it is said:

> "A corporation created by one state cannot, with some exceptions, do business in another state without the latter's consent, express or implied, with certain limited exceptions, namely, federal corporations or agencies, and corporations engaged in interstate or foreign commerce. And it may discriminate between its own corporations and those of other states, or foreign countries."

While the decisions, including those of this court, have spoken broadly upon this subject; and this and other Courts, narrowing the question, have spoken specifically on the question at hand, petitioner still debates whether the imposition of conditions can go so far as to affect the situation after dissolution of the corporation in the State of its domicile.

In 17 Fletcher Cyc. Corp., Sec. 8318, it said:

> "Generally speaking, a corporation does not take with it into a sister state, either the general legislation or the judicial decisions of the state of its creation, and such laws and decisions have no extraterritorial operation or force."

At an early day this Court, in McGoon vs. Scales, 9 Wall. 23; 19 L. Ed. 545-548, in discussing an act of the State of Wis-

consin which sanctioned a proceeding against a corporation dissolved in Illinois, the State of its domicile, said:

> "The constitutionality of this act is denied; but no provision of the Constitution of Wisconsin or of the United States is pointed out which is opposed to such legislation. It would, on the contrary, be a strange defect in the legislative powers if, under such circumstances, a state could not frame laws which would enable her citizens to subject the lands of a corporation whose charter had expired, to the debts which it owed to her citizens."

After all, it is a matter of local procedure, and law. Viewed from any scientific standpoint, it would seem obvious that it is within the province of a state to determine what actions shall abate or be revived, and the manner of abatement or revival.

The decisions of the Montana Court, in the case sought to be reviewed, settles the question as to what does or does not abate in cases of this character. Generally speaking, a Legislature has the power to authorize the continuance of suits by or against a corporation after its dissolution.

1 C. J. 136.

In most of the states, if not in all, the common law rule that pending actions by or against a corporation are abated by its dissolution, is now avoided by statutes either continuing the existence of a corporation for a certain time after dissolution by expiration of its charter or otherwise, or by providing for the continuance of pending actions either as originally instituted, or through substitution of other persons. This subject is fully treated in the annotations to

Houston v. Utah Lake, Land, Water & Power Co.,
55 Utah 393, 187 Pac. 174; 47 A. L. R. 1288.

The annotations to the last cited case succintly set forth the law of the various states and are embraced in p. 1288 to 1569.

In some instances statutes enacted for the regulation of

domestic corporations have been held insufficiently explicit to embrace foreign corporations. Thus, the annotator derives the law from all American cases on the subject.

47 A. L. R. 1564.

"Statutes which operate so as to prolong corporate existence, have, in several states, been held inapplicable to foreign corporations; but the Kentucky enactment has been declared to be applicable to foreign corporations having their principal place of business in that state."

"The Ohio enactment preventing the abatement of actions has been treated as controlling with regard to foreign corporations. The scope of an enactment may, of course, be extended to foreign corporations by explicit words, contained either in the enactment itself, or in some other statute. Whether such an extension should be predicated, is a matter to be determined from the language used by the Legislature."

In 1 C. J. 137, it is said:

"The question of continuing or reviving actions by or against a corporation after its dissolution depends upon the laws of the state in which the action is pending, and a foreign statute relating thereto is of no avail."

VI.

IF THE STATUTE PERMITS ACTIONS TO BE CONTINUED FOR OR AGAINST THE CORPORATION BY NAME, THERE NEED BE NO SUBSTITUTION OF PARTIES.

There need be no substitution of parties, unless the statute requires substitution. Clearly it is within the province of a legislature to so declare.

Kipp v. Miller, 47 Colo. 598, 108 Pac. 164;
Steinhauer v. Colmar, 11 Colo. App. 495, 55 Pac. 293;
Lucifer Coal Co. v. Buster, 64 Colo. 179, 171 Pac. 61;
Hazard v. Park, 294 Fed. 40;
Townsend v. Delaware Glue Co., 12 Del. Ch. 25, 103 Atl. 577;
Big Sespe Oil Co. v. Cochran, 276 Fed. 216;

Dixie Mfg. Co. v. Ricks, 153 Ga. 364, 112 S. E. 370;
Finger & T. Stone Co. v. Hutchinson, 176 Ill. 48, 51 N. E. 622;
12 R. C. L. 114.

VII.

DOCTRINE OF RELFE V. RUNDLE IS A CAREFULLY LIMITED ONE. FOR OBVIOUS REASONS, IT HAS NOT BEEN EXTENDED IN ITS APPLICATION TO CASES NOT FALLING CLEARLY WITHIN THE RULE. WHAT ARE THE LIMITATIONS TO ITS APPLICATION?

Petitioner has cited and insists upon the application of the rule of Relfe vs. Rundle, 103 U. S. 222; and of Converse vs. Hamilton, 224 U. S. 243; and like cases. Those cases apply only where there is (a), a statutory receiver; (b), appointed by law; (c), deriving title through a statute; and (d), not through a chancery decree; and (e), where the dissolved corporation was not restrained or controlled by a statute of the foreign state where it applied for admission and was admitted. To that end we shall endeavor to work out the rule applicable to the specific facts in this case, and thereby show a clear differentiation between those cases so cited, and the case at bar. Moreover, we shall show the Court the true rule which this and other courts have applied to similar, if not identical cases.

Relfe v. Rundle states an undeniable doctrine where there are no statutory limitations, that:

> "Every corporation necessarily carries its charter wherever it goes, for that is the law of its existence. It may be restricted in the use of some of its powers while doing business away from its corporate home; but every person who deals with it everywhere it bound to take notice of the provisions which have been made in its charter for the management and control of its affairs both in life and after dissolution."

That this statement is general and would apply and was

there applied to a case involving a set of facts unaffected by other important principles will be obvious upon the most superficial examination.

For instance, no constitutional right would be violated by the exercise of visitorial power in a foreign state; the rule rests upon expediency.

Williams vs. Gaylord, 186 U. S. 157; 46 L. Ed. 1102.

Likewise the "death" of a corporation, in its legal aspect, invokes only a rule of expediency.

Montana, or any other state may, as a condition upon which a foreign corporation is admitted to do business, declare that causes of action, maintainable against the corporation by name, shall survive dissolution. By such statute the corporate life, a mere fiction, is not legislated upon.

VIII.

MONTANA HAS NOT UNDERTAKEN TO SAY THAT A DISSOLVED FOREIGN CORPORATION IS ALIVE IN MONTANA. IT HAS ONLY SAID THAT IT REMAINS SUABLE.

In the sense that it is inherently impossible to breathe again the breath of life into a dead person or a dissolved corporation, an attempt to so do by legislation would appear incongrous. Nevertheless, it is neither incongrous, nor does it involve any constitutional right to declare that rights and remedies shall survive and be unaffected by either the death of a natural person or the dissolution (death) of a corporation.

In Rogers v. Adriatic Fire Insurance Co., 148 N. Y. 34; 42 N. E. 515, the Court of Appeals of New York said:

> "That the foreign corporation, dissolved and dead in the domicile of its origin, should be deemed alive in the foreign state so far as to save the remedies of its own citizens against property within its own jurisdiction, is entirely possible and not at all unreasonable."

This is true, upon the death of a non-resident defendant.

1 C. J. 230, Sec. 480.

This is true upon the dissolution of a foreign corporation (47 A. L. R. pp. 1557 to 1565, partly inclusive).

The general rule, applicable in the United States, is well stated in 12 C. J. 464, which reads:

> "Where, however, the place of domicile and of the act or contract are not the same, there has been some divergence in the authorities as to the proper law to govern. The continental writers incline to the view that the personal status of an individual, including his capacity to act or to contract, accompanies him wherever he may go, and that the law of his domicile will control no matter where he may be; and there are English and American authorities which have followed this rule, but the weight of the common-law authorities is to the effect that, in case of a conflict between the lex domicilii and lex loci contractus aut actus, the latter will prevail. In the United States practical necessity, arising from the great freedom of commercial intercourse between the several states of the Union, would, in the absence of all other reasons, seem to prevent a general adoption of the continental rule. In order to avoid the apparent anomaly resulting from the courts of a state giving validity to the act of a party done abroad, where they would refuse to enforce such act if it was done within the state, it has been suggested that the enforcement of the foreign law might readily be restricted by a positive prohibition of statute."

As an artificial being it may have and exercise only those rights and powers conferred upon it by the general law of its creator.

14 C. J. 51, Sec. 3.

When this artificial creature migrates, in the only way it can migrate, into another state, it does so under the rules of private international law, is subject to those rules of procedure prescribed by the rules of Conflict of Laws, just as is a natural person. Moreover, where there is an express statute of the state into which it migrates imposing conditions under which it shall operate and do business, it falls under restrictions

which might not be valid if applied to natural persons.

No constitutional provision would be involved or violated should any Legislature enact a provision fixing the status of a natural person, or declaring the effect of his death, or survivorship. When such statute is found, not only pertaining to a foreign corporation, but expressly assented to by it, there is an A PRIORI reason behind the validity of the Montana Constitution and Act.

See Fink v. National Union Fire Ins. Co., 90 S. C. 544; 74 S. E. 33; Ann. Cas. 1913 D. 221.

In 6 Enc. U. S. Sup. Ct. Dec. 313 it is said:

> "A state may impose upon a foreign corporation, as a condition to coming into or doing business within its territory, any terms, conditions and restrictions, which it may think proper, that are not repugnant to the constitution or laws of the United States. For the absolute power of exclusion includes the right to allow a conditional and restricted exercise of its corporate powers within the state. And its right is subject to the condition of obeying the lawful regulations of the state, of which all persons dealing with the corporation are presumed to have constructive notice."

While the facts in Relf vs. Rundle are easily distinguishable from the case at bar, the doctrine therein announced has been refused application in other cases where the law of the forum was different.

Mutual Life Ins. Co. v. Cohen, 179 U. S. 262; 45 L. Ed. 181.

IX.

THERE IS NOTHING INHERENTLY INCONGROUS IN A STATE PROVIDING BY STATUTE THAT A FOREIGN CORPORATION SHALL REMAIN SUBJECT TO SUIT INDEFINITELY UNTIL ITS CONTRACTS HAVE BEEN PERFORMED. THE MONTANA STATUTE IS VALID.

The text writers who have examined the entire subject find

nothing inconsistent in the holdings of the various courts to the effect that a state may lawfully consider that a corporation may still be proceeded against and its property subjected to the claim of creditors even though dissolved in the state of its domicile.

In Fletchers Enc. of Corp., Vol. 8, p. 9720, it is said:

> "The legislature of a state may provide that a foreign corporation which has been dissolved, but which owns property and owes debts in such state, may be sued and the property subjected to the payment of such debts. Such legislation was held to be constitutional by the Supreme Court of the United States, which said: 'The constitutionality of this act is denied; but no provision of the Constitution of Wisconsin or of the United States is pointed out which is opposed to such legislation. It would, on the contrary, be a strange defect in the legislative power if, under such circumstances, a state could not frame laws which would enable her citizens to subject the lands of a corporation whose charter had expired to the debts which it owed to her citizens.' Under a constitutional provision that no foreign corporation shall be allowed to transact business within the state on more favorable conditions than are prescribed by law to similar domestic corporations, it is held that a foreign corporation, when it comes into the state for the transaction of business, subjects itself to all of the laws of the state applicable to domestic corporations, and this same rule of equality continues, with the same rights and liabilities that attach to a domestic corporation, not only during the life of the foreign corporation transacting business in the state, but until its affairs have been settled upon its dissolution," citing McGoon v. Scales, 9 Wall. 23, 19 L. Ed. 545.

The following courts have expressed themselves in like manner upon the subject:

Stetson v. New Orleans City Bank, 2 Ohio St. 167; 12 Ohio St. 577;

Hauger v. International Trading Co., 184 Ky. 794; 214 S. W. 436;

Singer v. Hutchinson, 83 Ill. App. 675; 183 Ill. 606; 75 Am. St. Rep. 133; 56 N. E. 388;

Castle v. Acrogen Coal Co., 145 Ky. 591; 140 S. W. 1034;

Olds v. City Trust etc. Co., 185 Mass. 500; 70 N. E. 1022; 102 Am. St. Rep. 355;

Rogers v. Adriatic Fire Ins. Co., 148 N. Y. 34; 42 N. E. 515;

Life Ass'n v. Fassett, 102 Ill. 315;

Singer v. Hutchinson, 83 Ill. App. 675 (affirmed 183 Ill. 606, 56 N. E. 388; 75 A. S. R. 133).

The doctrine of Relf v. Rundle, and all related cases has no application where, as here, the Receiver is a mere chancery receiver.

On the score of the full faith and credit clause, the case admits of the clearest analysis.

Let us assume for the purpose of argument that the Iowa statutes authorize and the Iowa decree decides that the corporation is dead, and that Clark properly appeared in the action pending in Fergus County and properly invoked the full faith and credit clause,—conditions not present in this case, and to that plea the Montana Constitution and Montana Statute, as construed by the Court, were invoked. This is stating the case strong enough; yet, still the Iowa Statutes and the Iowa decree will not be permitted to ride down the Montana law.

It would be a strange application of ethics to permit a corporation to come into the state, assent to such constitutional and statutory provisions and then insist upon the paramount authority of the foreign decree and statute.

Andrews v. Andrews, 188 U. S. 14; 47 L. Ed. 366.

X.

THE IOWA COURT, AT THE TIME OF PRONOUNCING JUDGMENT RECOGNIZED THAT JUDGMENTS MIGHT BE ENTERED WHICH WOULD NOT BE SUBJECT TO COLLATERAL ATTACK, UNLESS SUITABLE PLEAS IN ABATEMENT BE FILED.

Clark was not precluded by the Iowa judgment,—at least

ACCORDING TO THE EX PARTE ORDER OF DECEMBER 22, 1931,—(R. 26-31), from appearing and presenting to the Tenth District Court of Fergus County, a plea, in abatement, for he was therein told (R. 30) "That E. W. Clark, Receiver, * * * be, and he is hereby given leave in his discretion to appear, specially, or as may be necessary, in any action wherein Federal Surety is named as defendant, for the purpose of presenting a plea in abatement, motion to dismiss, or motion to quash," etc.

The Iowa Court thereby RECOGNIZED THAT SUCH PROCEDURE MIGHT BE NECESSARY. Had Clark appeared with a plea in abatement in that action, he would have been met, as far as Montana is concerned, successfully with the contention that when Federal Surety Company came into Montana, it agreed that it would be bound by Montana law both substantive and adjective; and that the action must proceed to a judgment as instituted. Having been appointed in September, 1931 (R. 21) he could not have been ignorant of the pendency of the action. Due notice of the setting of the case for trial in May, 1932, was given. Counsel originally employed were permitted to be retained therein, and it is not a rank presumption to indulge that Clark had actual notice of the pending trial. No substitution was necessary. Had his plea in abatement been presented therein, and he had been aggrieved by the decision against him, then he at least could have had standing to present the constitutional question,—which he now has, we submit, no foundation for presenting to this Court.

XI.

AN ANALYSIS OF PETITIONERS' AUTHORITIES, SHOWING THEIR INAPPLICABILITY TO THE FACTS IN THIS RECORD.

We shall now analyze petitioners' authorities with the object of showing that they are not in point.

Relfe v. Rundle, 103 U. S. 222; 26 L. Ed. 337.

The outstanding features of this case are:

1. Life Association of America was incorporated under the laws of and domiciled in Missouri. A large judgment was ordered against it, giving occasion for Relf, the Insurance Commissioner of Missouri, to invoke the dissolution provisions of the Missouri statutes:

(a) Providing for the institution by him of an action for dissolution and the appointment of the Insurance Commissioner as statutory agent; and

(b) It was provided by statute that upon judgment of dissolution

> "All assets * * * shall vest in fee simple and absolutely in the Superintendent of the Insurance Department * * * who shall hold and dispose of the same for the use and benefit of the creditors," etc.

2. Process in the action in Louisiana out of which the decision arose, WAS SERVED AFTER the dissolution proceedings were begun in the Missouri Court.

3. There was no law of Louisiana, such as obtains in Montana, with respect to the right to sue the corporate entity after dissolution.

4. This court carefully recognized that the rule which it applied, the correctness of which cannot be denied, was unaffected by any statutory limitations in Louisiana, for it was said:

> "No state need allow the corporations of other states to do business within its jurisdiction unless it chooses * *; but if it does, without limitations express or implied, the corporation comes in as it has been created—"

Kinsler v. Casualty Company, 103 Nebr. 382; 172 N. W. 33.

This is easily distinguishable from the case at bar. There was no Nebraska statute cited by the court which imposed any limitation on the Corporation when it came into the State; and, on coming in,

> "It expressly reserved the right to have its affairs and all property interests adjudicated with reference to the Insurance Commissioner of New York."

By statute in New York, upon dissolution the property was vested in the Insurance Commissioner. Statutes of Iowa cited:

Section 8402 (R. 27) contains this peculiar provision concerning a dissolution suit:

> "Reserving, however, to the stockholders and creditors all rights now possessed by them."

Section 8964 (R. 27-28) provides that the Court, under certain circumstances, "SHALL DECREE A DISSOLUTION OF SAID COMPANY AND A DISTRIBUTION OF ITS EFFECTS, AND APPOINT A RECEIVER THEREFOR."

Sec. 8613, C. 1 (R. 28) which was enacted in 1929, provides that the Commissioner of Insurance "henceforth shall be the receiver and/or liquidating officer for any insurance company," etc. We reserve a more extended discussion of this statute for a later place in this Brief.

Further analyzing the decisions cited, it appears in:

> State v. Fidelity Loan Co., 113 Iowa 439; 85 N. W. 638;

that the sections of the Code 1040 and 4113 there construed by the court do not seem to be those obtaining at the time of the decree now in question. However, further than stating the common-law rule as to the effect of dissolution, which everyone concedes, it has no bearing on this case.

> Remington v. Samona Bay Co., 140 Mass. 494; 5 N. E. 292,

is clearly not in point.

No statute of Massachusetts was brought into controversy purporting to extend corporate life, OR DECLARING, that notwithstanding dissolution, the corporation was still suable.

Marion Phosphate Co. v. Perry, 74 Fed. 425.

The decision was rested upon the very obvious fact that the Florida statutes extending corporate life were not aimed at, and did not apply to foreign corporations, the Court saying:

> "These last quoted sections indicate that there was no purpose in the act to in anywise treat foreign corporations doing business in the state as Florida corporations."

In Felts v. Natl. Life Ass'n, 130 Ala. 413; 30 S. 374,

The Court simply holds that the statute of survivorship was enacted solely to govern domestic corporations, and does not apply to foreign corporations.

Okla. Natural Gas Co. v. Okla., 273 U. S. 257; 71 L. Ed. 634,

is in no sense, authority for the petitioner. The court simply held that under the record it could not be ascertained whether liquidating Trustees had been appointed as contemplated by statute. The Court seemed to recognize that the statute would if the facts permitted its application, extend the corporate life. No foreign statute was involved. A domestic corporation was under consideration.

Ridell v. Rochester German Ins. Co., 35 R. I. 45; 85 Atl. 273.

This case simply holds in line with several other American courts that the statute of Rhode Island was designed to apply to domestic and not foreign corporations.

Gulledge Bros. L. Co. v. Wenatchee Land Co., 115 Minn. 488; 132 N. W. 992.

This case is very simple. A dissolved Washington corporation undertook to maintain an action in Minnesota. IT WAS MET BY A PLEA IN ABATEMENT.

Conceding the truth of the plea, plaintiff applied for and had appointed, a receiver, and then asked that he be substituted as plaintiff. The right of substitution was denied because, upon dissolution, under Washington Statutes, title to the corporate property vests in the Trustees. The Court held:

> "Such being the situation and status of the corporate property, no right to any part thereof became vested in the receivers appointed by the Court below, and they can have no right to be substituted as parties to the action."

Consistent with other cases, the Court held that the Minnesota statute extending corporate life was enacted solely to regulate domestic corporations, and, of course would not apply to a foreign corporation.

The text of Thompson on Corporations, being based upon these decisions (3rd Ed. 40), like a stream, can rise no higher than its source.

> Morgan v. N. Y. Natl. Bldg. & Loan Assn., 73 Conn. 151; 46 Atl. 877,

is, we submit, not in point.

> McRae v. Kansas City Piano Co., 69 Kan. 457; 77 Pac. 94;

simply holds that in the absence of a statute continuing the corporate entity for the purpose of suit, dissolution abates action. The Court said:

> "It is only in virtue of some statute authorizing it * * * that these results may be avoided, or pending proceedings may be further prosecuted, or judgments already rendered, enforced."

Both the Kansas and Missouri statutes (Missouri being the state of domicile and Kansas the foreign), were examined to find an applicable survival statute.

> In First National Bank of Selma v. Colby, 21 Wall. 609; 22 L. Ed. 687,

suit was brought against a dissolved National Bank. ON A

PLEA IN ABATEMENT, the Court held that the action abated because there was no survivorship statute, saying:

> "This is the rule with regard to all corporations whose chartered existence has come to an end * * * unless, by statute, pending suits be allowed to proceed to judgment notwithstanding such dissolution."

That the Court seriously considered the law of the forum as applicable, is apparent from the use of this language: "No such enactment is found in the Act of Congress * * * NOR IS THERE ANY PROVISION ELSEWHERE."

Combes v. Milwaukee & M. Ry Co., 89 Wis. 297; 62 N. W. 89,

the Court considered the case as presenting a common law question. No survivor statute was involved nor any mention made of one.

Muma v. Potomac Co., 8 Pet. 284; 8 L. Ed. 945.

A PLEA IN ABATEMENT was very properly sustained because of the dissolution of the defendant corporation. No survival statutes were involved:

Venable v. Granite Co., 135 Ga. 508; 69 S. E. 822; 32 L. R. A. (NS) 446.

No saving statute was involved, and the common law rule prevailed. The Court makes special mention of the probable effect of a saving statute, in these words:

> "It has been held in many cases that, if a corporation becomes extinct pending a suit to which it is a party, the suit thereby abates as to such corporation, and any judgment thereafter rendered against it is a nullity, unless some provision is made for the further prosecution of the suit by the laws of the state in which the suit is pending."

In Pendleton v. Russell, 144 U. S. 640; 36 L. Ed. 574.

No survival statute was involved. The Court very properly applied the common law rule.

Roche v. McDonald, 275 U. S. 449; 72 L. Ed. 365,

concerns the full faith and credit clause. It announces no new nor any applicable principle. Neither does

Converse v. Hamilton, 224 U. S. 243; 56 L. Ed. 749.

The Court in that case said:

> "True, the full faith and credit clause of the Constitution is not without well recognized exceptions, as is pointed out in Huntington v. Attrill, 146 U. S. 657; 36 L. Ed. 1123; Andrews v. Andrews, 188 U. S. 14; 47 L. Ed. 366; and Natl. Ex. Bank v. Wiley, 195 U. S. 257; 49 L. Ed. 184."

In Hancock Natl. Bank v. Farnum, 176 U. S. 640; 44 L. Ed. 619,

the Court held that a stockholder was a privy of a bank, and that a judgment against the bank was a judgment against and binding upon a stockholder, to which full faith and credit must be given. We fail to find any application of its principles to the case at bar.

XII.

THE STATUTE OF IOWA DID NOT VEST TITLE IN CLARK.

In Vol. 1, Clark on Receivers (2nd Ed.) p. 463, the learned author says:

> "The statutes of many states specifically authorize the appointment of a receiver of corporations * * *. These statutes frequently provide that when a receiver is appointed under such statutes, such receiver obtains not only possession of the property, and (but) legal title to the same, and, having this legal title, such receiver is thereby able to go into a foreign jurisdiction and sue in the courts of such foreign jurisdiction * * *. Some statutes go farther and provide that an ordinary equitable receiver of a corporation, or of individuals or of a partnership, shall be vested with title to the property."

Again in Vol. 1, Clark on Receivers (2nd Ed.), Sec. 341, it is said:

> "A receiver has no title to the fund, but simply acts as the arm of the court. In the absence of some conveyance (or) a statute vesting the property of the debtor in him, he cannot sue in the courts of a foreign jurisdiction."

See also Vol. 1, Clark on Receivers (2nd Ed.), Sec. 346.

Upon an examination of these authorities it will be ascertained that the statute must specifically and not impliedly grant the title.

An examination of the Legislative Act found in the Iowa Code as Sec. 8613, C-1 as set forth in petitioners brief, discloses that it became effective April 9, 1929. The title to that act reads:

> An act making "The Insurance Commissioner of the State of Iowa the Receiver or Liquidating Officer for Insurance Companies, Associations or Insurance Carriers."

Since the title of the act would not indicate any intent to vest the receiver with title, the argument that there is an implication falls without force.

In Clark on Receivers (2nd Ed.) Vol. 1, p. 181, Sec. 146, it is said:

> "Statutes which abrogate or abridge chancery courts generally are to be strictly construed, and if the restrictive purpose is not clear it will not be extended by construction."

For an application of all of these principles see

> Zacher v. Fed. Trust & Safety Valve Co., 106 Fed. 593.

Therein was involved the Connecticut statute.

Relfe v. Rundle is clearly distinguished and the Court declared that in the absence of a statute vesting title, the receiver became a mere equity receiver.

See also Clark on Receivers (2nd Ed.), Vol. 1, pp. 811-12-13.

The question may be asked as to where title is reposed.

In Vol. 1 Clark on Receivers, Sec. 347 (2nd Ed.) the learned author suggests that it may be a little difficult to determine exactly where title reposes, but it is suggested that the court has dominion over the property, and can order its disposition.

It would seem immaterial as to just where the title is reposed. Of course it must be understood that the court may by its decree, invest an equity receiver with title, but unless that is pursuant to a statute, the receiver does not thereby obtain extraterritorial authority.

Cases distinguishing Relfe v. Rundle, 103 U. S. 222; 26 L. Ed. 357;

In Sterrett v. Second Nat'l Bank, 248 U. S. 73; 63 L. Ed. 135,

the Court analyzes many of the decisions handed down by this Court up to that date, and declares that the doctrine of the Sterrett case has been the doctrine of this Court since the decision in Booth v. Clark, 17 How. 322; 16 L. Ed. 164.

Other decisions of this Court on the subject are:

Hale v. Allinson, 188 U. S. 56; 47 L. Ed. 380;
Great Western Minn. & Mfg. Co. v. Harris, 198 U. S. 561; 49 L. Ed. 1163;
Keatley v. Furey, 226 U. S. 399; 57 L. Ed. 273.

In Sterrett v. Second National Bank, 248 U. S. 73; 63 L. Ed. 135, the Court had under consideration a statute of Alabama in order to ascertain therefrom whether or not that statute would cast the case under the doctrine of Booth v. Clark, 17 How. 322; 15 L. Ed. 164, or under the doctrine of Relfe v. Rundle, 103 U. S. 222; 26 L. Ed. 357, and quoted therefor in the discussion of the Alabama statute. We submit that the decision is conclusive of this case.

Let us compare the Iowa Code provisions relied upon, with those of Alabama so construed by the Court. The Iowa Code provides that if certain conditions prerequisite are presented: "It, or he (the Court or Judge) shall decree a dissolution of said Company and a distribution of its effects, and appoint a receiver therefor."

Sec. 8964, Iowa Code set forth (R. 4).

The Alabama statute under consideration in the Sterrett case reads:

> "Shall appoint a receiver of all the books, property and assets of the corporation * * * (who) shall, under the direction of the Court, collect all debts due the corporation and sell all the property, real and personal, of the corporation, pay the debts thereof ratable or in full, as the funds realized may admit, and divide the residue after the debts and costs are paid," etc.

The next section of the Alabama Code considered by the Court reads:

> "* * * The Court * * * may appoint a receiver of all the property and assets of the corporation (who) under the direction of the Court must exercise the same powers and perform the same duties as are required of receivers in the next preceding section, and otherwise manage the affairs of the corporation pending final settlement thereof, as the Court shall direct."

Of the two acts, the Alabama act would more nearly accomplish the result contended for by petitioner, than the Iowa act; and this Court said that the conclusion was not warranted "that title is vested in the receiver as assignee or as statutory successor of the insolvent corporation in such wise as to authorize the action to recover in a foreign jurisdiction. * * * The statutes do not undertake to vest in the receiver, an estate in the property to be administered for the benefit of creditors."

That the Iowa District Court has not given this statute the breadth contended for, is apparent from a reading of the decree (R. 21-26).

The Court must approve and control the discretion of the receiver (Par. 10, R. 24-25). No sale is valid until the receiver report such sale to the Court and have the same confirmed (Par. 12, R. 25).

The alleged decree of December 22nd, 1931 (R. 26-31)

which petitioner dignifies as a decree, but which the Court itself declares is an "order as to suits and contracts in which Federal Surety Company was or is alleged to be a party," was entered without notice and ex parte, on the 22nd day of December, 1931, and can have no force whatever.

In Booth v. Clark, 17 How. 322, 15 L. Ed. 164,

the very limitations made by the Iowa decree of September 25 (R. 21-26), as we have called them to the attention of the Court supra, were sufficient for this Court to declare that the receiver there under consideration was a mere equity receiver.

The Court said:

> "Whatever may be the operation of the decree in respect to the receiver's powers over the property of the debtor within the state of New York, and his right to sue for them there, we do not find anything in the cases in the New York reports showing the receiver's right to represent the creditor or creditors of the debtor in a foreign jurisdiction."

Commenting upon his granted authority the Court further says:

> "He is a representative of the Court, and may by its direction, take into his possession every kind of property * * *; but it is not considered in every case that the right to the possession is transferred by his appointment * * *. When appointed, very little discretion is allowed to him, for he must apply to the Court for liberty to bring or defend actions, to let the estate, and in most cases, to let out moneys * * *."

In Hale v. Allinson, 188 U. S. 56; 47 L. Ed. 380,

the Court had under consideration whether or not a Minnesota receiver was vested with title under the statute authorizing the Court to "appoint a receiver of the same," and held that it did not operate to vest him with title. Commenting upon the statute and of the decisions of Minnesota, the Court said:

> "This language would seem to indicate that there is nothing in the statute which prevents a receiver from

maintaining an action in a foreign state. There is no holding that the statute itself provides in terms for such an action, or empowers a receiver to maintain it, or that it transfers any title in the fund to him."

Again the Court says:

"It seems also entirely clear that the receiver provided for in Section 5906 of above quoted statute, while not the receiver mentioned in Section 5897, is yet simply one to be appointed in aid of the court * * * if the court chooses to appoint him."

In Keatly v. Furey, 226 U. S. 399; 57 L. Ed. 273, the Court had under consideration a statute of West Virginia providing for the receiver taking, "charge of," and administering the assets, and for the bringing of suit and the conveyance of property in the corporate name thereafter.

The Court, in commenting on it said:

"It seems, to be sure, that in September and October, the local West Virginia Court purported to authorize and confirm a deed by a special commissioner to the receiver, but if the statute did not in itself constitute the receiver the universal successor of the corporation (See Chipman v. Mfg. Nat. Bank, 156 Mass. 147-149, 30 N. E. 610), it may be doubted whether the deed had extraterritorial effect. See Fall v. Eastin, 215 U. S. 1; 54 L. Ed. 65; 23 L. R. A. (NS) 924 * * *. The argument is strong to support the judgment of the court below, if no title passed."

Learned Counsel for petitioner in their brief, page 45, after indicating that there may be a doubt as to the effect of this decree declare "to imply a transfer of the title to the Iowa Commissioner essential to carrying out, the trust imposed on him by the statute, is but the application of an axiom well known to the law of trusts."

The decisions of this Court would seem to be a complete answer to that suggestion. The statute itself, contemplates a mere equity receiver.

The judgment which petitioner has under attack, appears in the judgment roll regular in every respect (Tr. 49-64). As

opposed to that judgment there is a record which fails to disclose wherein any Court having jurisdiction, ever passed upon the points made the basis of petitioner's contention at this time.

XIII.

ONLY ONE JUDGMENT OF THE IOWA COURT.

Learned Counsel seemed to find it important to dignify both the decree of the Iowa Court entered on the 25th day of September, 1931 (R. 21-26), and the "order as to suits and contracts to which Federal Surety Company was or is alleged to be a party," made on the 22nd day of December, 1931, as DECREES.

The latter is in no sense a decree and does not rise to any dignity whatever further than in harmony with the label placed upon it. It would not be indulging too strong a presumption to say that it was quite apparent to Receiver Clark and his Counsel from a consideration of the two sections of the Iowa Code (R. 27-28), that clearly Section 8964 of the Iowa Code of 1927, did not rise to a dignity sufficient to permit the application of the doctrine of Relfe versus Rundle, and that it was necessary to spread something upon the record which would make it appear that the Court had acted under, not only that section, but under Section 8613, C 1, and in a manner different than the plain phrasing of the decree of September 25th, 1931, would warrant. It must have been perceived that the provisions of the latter section, being in the alternative, should have been judicially exercised in order that a contention such as is made here, could be plausibly presented.

We must strenuously object to the classification of this ex parte order made without process, being dignified as a judgment or decree to which any faith or credit whatsoever must

be given.

While the Court might have power to amend a judgment if suitable steps, including due notice were shown to have been taken, the judgment would not even be amendable to include something which the Court might have had jurisdiction to insert therein, but failed so to do. It will be seen that under any construction of the Iowa statute, the Court would not have had authority to insert what is embodied in the ex parte order of December 22nd, 1931.

Freeman on Judgments (5th Ed.) Vol. 1, Sec. 141 says:

> "The general power to correct clerical errors and omissions does not authorize the Court to repair its own inaction, to make the record and judgment say what the Court did not adjudge, although it had a clear right to do so. The Court cannot, under the guise of correcting its record, put upon it an order or judgment it never made or rendered, or add something to either which was not originally included, although it might or should have ordered or adjudged in the first instance. It cannot thus repair its own lapses or omissions to do what it could legally and properly have done at the right time."

We do not concede that had the Court in its decree designated Clark as Liquidating Officer, it would have made any difference in view of what we shall presently present. It is sufficient to say that when carefully analyzed, this later ex parte order affords the only color for petitioner's argument.

The following authorities will bear upon a consideration of a proper construction of both the decree and this ex parte order. The decree is not phrased in words of the present tense. This is one of the requisites of a valid judgment.

C. M. Co. v. M. O. P. Co., 27 Mont. 152; 69 Pac. 714.

It is contrary to all approved forms of judgment.

33 C. J. 1192.

The only authority of the Iowa statute was to require the Federal Surety Company, "to show cause why its business

shall not be dissolved."

We are obliged to give strained construction to this statute to work out from it any warrant of authority to dissolve the corporation, and appoint any other than a Chancery Receiver, whether either of the statutes relied upon by petitioner is considered. The dissolution of a business would appear to be something quite different from the dissolution of the corporation itself. See 14-a C. J. 1120. The giving of full faith and credit is not a one sided requirement. Petitioner Clark assumes the right to ask this Court to ride down the Montana Constitution and statutes quoted in the opinion of the Montana Court.

Section 6212 Revised Codes of Montana, 1921, after requiring a foreign insurance company to make an appointment of a service agent in Montana by power of attorney, declares:

> "Said power of attorney shall stipulate and agree on the part of the company, corporation, or association that any lawful process against the same which is served on said attorney shall be of the same legal force and validity as if served on the company, corporation or association, and that the authority shall continue in force so long as the certificate of membership, policy, or liability remains outstanding against the company, corporation or association in this state."

Singer & Talcott Stone Co. v. Hutchinson, 176 Ill. 48; 51 N. E. 622.

Illinois, it seems has two statutes; one continuing corporate capacity of a dissolved corporation for two years, "for the sole purpose only of collecting the debts due to said corporation, and selling and conveying the property and effects thereof."

There is then a statute akin to Sec. 6212 Montana R. C. 1921, and reading:

> "The dissolution, for any cause whatever of any corporation created as aforesaid, shall not take away or impair any remedy given against such corporation, its stockholders or officers, for any liabilities incurred previous to its dissolution."

The Montana Court quotes Section 6013 Revised Codes of 1921, and construes it in harmony with similar constructions by other state courts. These statutory provisions should have no faith nor credit in the eyes of the petitioner.

XIV.

WHILE THE IOWA COURT DID NOT EXERCISE THE AUTHORITY OF SEC. 8613, C 1 (R. 28), THERE IS AN IMPORTANT MATTER IN CONNECTION WITH THAT SECTION FOR THE CONSIDERATION OF THIS COURT.

That was a part of the acts of the Forty-third General Assembly of Iowa which was in session from January to April, 1929. If Federal Surety Company imported its general statutes to Montana at some time prior to 1925, at which time it was doing business in Montana, and furnished the bond which occasioned the liability (R. 56), IT DID NOT IMPORT THIS STATUTE.

XV.

PETITIONER DEMANDS THAT HIS JUDGMENT AND THE IOWA STATUTES SHOULD HAVE SUPREMACY OVER VALID MONTANA STATUTES. HE EVEN INSISTS THAT A STATUTE OF IOWA ENACTED LONG AFTER THE ENTRANCE OF FEDERAL SURETY COMPANY INTO MONTANA, SHOULD CONTROL STATUTES OF MONTANA.

Petitioner must take this position therefore, that having agreed to be bound by the Montana statutes, Federal Surety Company, although not having any limitations in its charter for the appointment of a liquidating officer such as he claims were afforded by later Iowa enactment and the application of the doctrine of Relfe vs. Rundle thereto, that he can bring in all later Iowa enactments to his aid. To permit him to do so would impair rights accrued to Montana creditors by virtue of a valid law of Montana.

It is elementary law that the general public policy of a state, when it violates no principle of constitutional law, is controlling.

In at least two other states besides Montana, viz: Kentucky and California, a constitutional provision similar to Article XV Sec. 11 of the Montana Constitution, is found. This Constitutional provision is found in Article XII Sec. 15 of the California Constitution.

See 7 Cal. Jur. 217, Sec. 701.

The Kentucky case of Castle v. Acrogen Coal Co., 145 Ky. 591; 140 S. W. 1034, also applies the Kentucky Constitution.

The Federal Court in Williams v. Gold Hill Min. Co., 96 Fed. 454, has held the California Constitution to declare the public policy of the state with regard to foreign corporations, and applied it in harmony with the California declaration on the subject.

We direct particularly to the attention of the Court, the case of Clark v. Supreme Council C. F. 146 Cal. 598; 80 Pac. 931, refusing to permit a foreign receiver such as Clark, to appoint an ancillary receiver in the state, and take away assets levied upon by local creditors in accordance with valid California laws.

See also Lackman v. Supreme Council, 142 Cal. 22; 75 Pac. 583; Borton v. Brines-Chase Co., 175 Pa. 209; 34 Atl. 597; 53 C. J. 406.

XVI.

THE IOWA VIEW OF THE EFFECT OF JUDGMENTS SUCH AS THE ONE AT BAR, IS IN HARMONY WITH THE CONTENTIONS OF RESPONDENTS.

In Schloss v. Met. Surety Co., 149 Ia. 382, 128 N. W 384,

is found a complete analysis of this very situation. The Iowa Court differentiates Relfe vs. Rundle. We commend the reading of this case with a view of ascertaining the public policy in Iowa, and the construction which Iowa places upon judgments of like character to the one sought to be enforced in this case. We consider the expressions of the Iowa Court in this case practically conclusive on facts so similar as to be almost identical. In other words, if the judgment at bar is to be given the force and effect that it would be given in Iowa, then what effect the Iowa Court declares it would give to a similar judgment coming to it from elsewhere, is conclusive.

The later act of the Forty-third General Assembly (which was in session from January to April, 1929), declaring, "The Commissioner of Insurance henceforth shall be the receiver and/or liquidating officer for an insurance company," etc., does not indicate any enlargement of his powers or suggestion of a trust. He was not selected as liquidating officer by the decree of September 25th.

The word "liquidating" from which the words "liquidation" or "liquidator" are derived, means, according to 37 C. J. 1263: "to adjust; to ascertain or reduce to precision in amount; to ascertain the balance due; to whom due, and to whom payable; to clear away, to lessen a debt; to clear from obscurity; to clear up; to determine by agreement the precise amount of indebtedness; to extinguish an indebtedness; to pay; to pay and settle; to reduce to precision in amount; to satisfy; to settle."

It will be seen that in no sense is there any implication of the passing of title. The words of nearest analogy to "liquidating officer," are "liquidating partner," 37 C. J. 1264. He is declared to be "the partner who, upon the dissolution or insolvency of the firm, is appointed to settle its accounts, collect

assets, adjust claims and pay debts."

Whatever may have been the legislative intent in the use of "receiver and/or liquidating officer," it is clear that it meant that the Court might appoint the Commissioner as receiver, and use its discretion with regard to whether or not he should be appointed as liquidating officer; whether that phrase has greater or less significance than that of receiver.

The entire decree will be searched in vain for the use of any other word or phrase in that connection, than "receiver."

The use of this phrase (and/or) in contracts seems to be entirely permissible, and is said to be equivalent to a direction that it be construed so as to best accord with the equity of the situation, using either conjunction, but such usage cannot apply to statutes, since the Legislature, in making its laws, must exercise its own law and leave nothing to the mere will and caprice of the courts.

State v. Dudley, 106 S. 364; 159 La. 872.

In any event if it were a matter of discretion in the court, the decree of September 25th indicates no exercise of the Court's discretion. It is very important that under the guise of instructions and without binding effect, Clark who was interested in the enlargement of the scope of the decree presented for signature, the ex parte order of December 21st.

XVII.

DEVOLUTION OF TITLE DISCUSSED IN FORMER BRIEF.

We have, in our original brief, discussed the question of devolution of title. We shall not again burden the Court with a re-citation of the authorities, nor with the discussion pertaining thereto as found in that brief.

We do not abandon our position or any position we have taken therein.

RESUME.

The Respondents respectfully submit this resume of their contentions.

1. There has been no attempt on the part of the Montana Court to refuse full faith and credit to the Iowa judgment and decree.

2. The judgment, the effect of which petitioner would like to dispel; is a valid, enforceable and unattacked judgment.

3. There was no attempt made by petitioner to appear in that independent case and assert a plea in abatement. Clark is indirectly attacking a judgment valid upon its face.

4. Respondents are asserting rights which grew up under a statute existing at the time Federal Surety Company entered the state, and to which Clark owes the duty of giving full faith and credit under the same constitutional provision that he invokes.

5. Petitioner seeks to ride down the Montana Constitution and statute by virtue of a statute enacted in 1929, years after the enactment of the Montana statute, and years after Federal Surety Company entered Montana, the accruing of respondents' cause of action, the initiation of their suit, and the vesting of their rights under the remedial provisions of the Montana statute.

6. The Iowa Judgment construed with the utmost liberality in conjunction with statutory justification, casts the rights of Clark into the category of cases determined in Booth vs. Clark, supra, and is clearly distinguishable from the cases asserting the doctrine of Relfe vs. Rundle, supra.

7. The Montana statute is a remedial statute and binding as to all matters of procedure upon those asserting judgments from sister states.

8. The judgment asserted by Clark as affording rights contended for, was asserted, not in an action instituted by him but in an action instituted by another, which action was of such character as to fail to give the Court in which the judgment was asserted, jurisdiction.

We respectfully submit that the judgment of the Montana Court should be affirmed.

Respectfully submitted.

LOUIS P. DONOVAN,

H. LEONARD DeKALB.